

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

77-6047

-----:
WALTER WOE, et al.,

Plaintiffs-Appellants,

- v. -

JOSEPH C. CALIFANO, et al.,

Defendants-Appellees.



-----:
YETTA YOE, et al.,

Plaintiffs-Appellants,

- v. -

Docket No. 77-6047

LAWRENCE C. KOLB, M.D.,

Defendants-Appellees.

-----:
KENNETH KOE, et al.,

Plaintiffs-Appellants,

- v. -

JOSEPH C. CALIFANO, et al.,

Defendants-Appellees.

-----:
BRIEF FOR APPELLANTS

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STATUTE INVOLVED

Title XVI, §1611 (e) (1)

. . . .

(B) In any case where an eligible individual or his eligible spouse (if any) is, throughout any month, in a hospital, extended care facility, nursing home, or intermediate care facility receiving payments under a State plan approved under Title XIX, the benefit under this title for such individual for such month shall be payable

(1) at a rate not in excess of \$300 a year

INTRODUCTORY STATEMENT

This is an individual and class action for a declaratory judgment as to the constitutionality of the denial of federal Supplemental Security Income (SSI) Program benefits to those state mental hospital patients who have been involuntarily civilly committed to unaccredited state facilities.

These direct payments are intended only for personal items purchased by these beneficiaries, all of whom are penniless; all of whom are over 65; all of whom are permanently disabled because of their age and their severe mental and physical illnesses; and, all of whom are involuntarily civilly committed by a New York Supreme Court Judge to this inferior unaccredited facility. These payments are \$25.00 a month or less.

In November, 1975, the federal defendants informed the named involuntarily civilly committed SSI beneficiaries who are the plaintiffs herein, that all further SSI payments would cease in January, 1976 because their institution, Pilgrim State Hospital, had lost its accreditation by the Joint Commission on Accreditation of Hospitals.

In December, 1975, after the initiation of this lawsuit, and after the initiation of administrative proceedings on behalf of other similarly situated plaintiffs against the federal defendants, the defendants then proceeded to inform the plaintiffs that the disputed SSI payments would continue until the proceedings were decided.

The federal defendants then moved to dismiss this lawsuit for a declaratory judgment as moot. The District Court granted the motion to dismiss without convening a statutory three-judge court. The decision is annexed hereto as Appendix "C," at pages "C-3" through "C-5."

Plaintiffs appeal claiming that:

" There is a line of decisions in this Court standing for the proposition that the 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e. does not make the case moot.' United States v. W.T. Grant Co. 345 U.S. 629, 632 (1953)." as cited in De Funis v. Odegaard, 416 U.S. 312, 318 (1973).

STATEMENT OF THE CASE

In 1972, Congress passed Title XVI of the Social Security Act of 1935, as amended, usually known as the Supplemental Security Income Program, or SSI. This program provides direct payments for those persons with limited incomes and assets who are over 65, blind or permanently mentally or physically disabled.

At present, more than \$6.3 billion annually is paid to more than 4.4 million recipients as direct payments. New York Times, April 3, 1977, p. 39, col. 1.

If the plaintiffs, Kenneth Koe, Lawrence Loe, Mathew Moe and Nathan Noe, lived in the community, they all would have received a monthly federal direct SSI payment for food, clothing, shelter and personal items.

Upon being involuntarily civilly committed to Pilgrim State Hospital, a New York state mental hospital, their SSI benefits decrease to \$25.00 a month or less for personal items. Title XVI, §1611 (e) (1) (B).

This direct payment is given to them because it is recognized that Koe and the others are very poor, and have no other funds to purchase these essential personal items while in the state institution. The federal government has recognized that the state institution supplies neither these funds nor these personal items.

The federal government pays this money directly to the patient because it recognizes that these personal items are essential for the proper social functioning and rehabilitation of the inmate while he is being institutionalized. Koe and the others can use these SSI payments to purchase toilet articles, a newspaper, cigarettes, sodas, stationary, stamps, cans of food to supplement an inadequate institutional diet, an article of clothing to change from the bleak institutional uniform, to make a telephone call to family or friends, etc.

In November, 1975, immediately after Thanksgiving, the federal defendants sent a "Thanksgiving message" to thousands of severely mentally ill and very poor inmates of New York state mental institutions. This federal Thanksgiving message informed Koe and thousands of other patients who were SSI beneficiaries, the federal government intended to deprive them of their \$25.00 a month grant for personal items.

This federal "Thanksgiving message" was the result of Pilgrim State Hospital, a New York state mental hospital located in Suffolk County, and which is the largest New York state mental hospital with over 6,000 inmates, and Creedmoor State Hospital located in Queens County with over 3,000 inmates, both having lost their previously

undeserved accreditation as a psychiatric facility by the Joint Commission on Accreditation of Hospitals.

As a result of this loss of accreditation, these state hospitals could no longer be considered to be part of a state plan under Title XIX of the Social Security Act of 1935, as amended, commonly known as Medicaid. Because they were no longer approved under Title XIX, patients in both Pilgrim State and Creedmoor State Hospitals were no longer eligible for SSI payments under Title XVI, §1611 (e) (1) (B).

In December, 1975, as a result of representatives of other patients in these facilities starting to appeal these decisions before administrative agencies, the federal defendants decided to continue these SSI payments until a final decision was made by the administrative agencies.

The loss of accreditation of these facilities is a direct result of protests made to the Joint Commission of Accreditation of Hospitals by the Federation of Parents' Organizations for the New York State Mental Institutions Inc.

The loss of accreditation caused by these protests meant that the State of New York lost the Medicaid funds

that formerly went into the general funds of the state. As indirect reimbursement by the federal government, these funds never benefited the state mental hospital patient and only increased the general funds of the state.

Because the Federation of Parents' Organizations properly protested inadequate care at the state facilities, the only result to the individual patient is not any improved state or federal appropriation for better care, but only the loss to individual patients of their needed SSI direct payment.

Annexed to this Brief as Exhibit "I" is a report entitled "JOINT COMMISSION ON ACCREDITATION OF HOSPITALS (J.C.A.H.) ACCREDITATION STATUS OF STATE MENTAL DISABILITY FACILITIES AS OF JULY 1, 1975, Study No. 290 of the National Association of State mental Health Program Directors (October, 1975) , pages 1-6, that shows that the question of accreditation for state facilities is a widespread problem not limited to this case.

Also annexed to this Brief as Exhibit "II" is a letter of November 26, 1975 to Hon. David Mathews, then Secretary of the United States Department of Health, Education and Welfare from Dr. Lawrence C. Kolb, Commissioner of the New York State Department of

Mental Hygiene that shows how essential this SSI payment is for the adequate and necessary care and treatment of these patients.

STATEMENT OF THE ISSUES

I. As there is no dispute as to the facts, there is no need for an evidentiary hearing and the only issue is a constitutional question of first instance.

Is the plaintiffs' request for a declaratory judgment moot simply because the federal defendants have temporarily withdrawn their immediate threat to invidiously cease the SSI payments to the plaintiffs ?

II. In New York State, the involuntarily civil committed go only to state mental hospitals. This is the de facto practice of the New York Supreme Court judges.

Is it a violation of the equal protection-due process provisions of the Fifth Amendment to deprive an involuntarily civilly committed state mental hospital inmate of a \$25.00 a month direct SSI payment to be used only for personal items. These are personal items that the SSI recipient-patient is too poor to purchase, that the state institution does not provide and that are essential for minimum social rehabilitation.

ARGUMENT

I. PLAINTIFFS' REQUEST FOR A DECLARATORY JUDGMENT IS NOT MOOT.

As there is no dispute as to the facts, there is no need for an evidentiary hearing. Mathews v. Eldridge, 424 U.S. 319 (1975)

The sole issue before the District Court is whether making the direct SSI payment arbitrarily dependent upon whether the involuntarily civilly committed patient is sent to an accredited or unaccredited state facility is invidious.

Whether the plaintiff is involuntarily committed to an accredited or an unaccredited facility; whether the facility is accredited today, unaccredited tomorrow, and then re-accredited again; and whether the federal defendants decide to hold up payments today, restart payments tomorrow, and then hold them up again; etc. should not bar a final resolution of this issue that is of vital importance to hundreds of thousands, and even millions of Americans annually, and that is a constantly recurring problem before the Social Security administrative agencies and District Courts.

This issue is not moot and is controlled by the decision of the Supreme Court in DeFunis v. Odegaard, 416 U.S. 312 (1973).

" There is a line of decisions in this Court standing for the proposition that 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e. does not make the case moot.' United States v. W.T. Grant, 345 U.S. 629, 632 (1953), et al.

(A) voluntary cessation of the . . . practices complained of could make this case moot only if it could be said with assurance 'that "there is no reasonable expectation that the wrong will be repeated. " ' . . . Otherwise, ' the defendant is free to return to his old ways,' . . . and this fact would be enough to prevent mootness because of the ' public interest in having the legality of the practices settled.' Ibid.

It might also be suggested that this case presents a question that is 'capable of repetition, yet evading review,' Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911), et al. " (at 318-19)

II. THE SSI EXCLUSION OF DIRECT PAYMENTS TO
INVOLUNTARILY CIVILLY COMMITTED INMATES OF
NON-ACCREDITED STATE HOSPITALS IS INVIDIOUS.

Congress specifically granted a certain sum each month to be used for personal expenses by SSI beneficiaries who are involuntarily civilly committed in state facilities.

Congress recognized that the patient was so poor that he did not have the funds for these personal items; Congress recognized that the state did not provide these items; and, Congress recognized that these items were essential for social well-being and rehabilitation.

It is unjust, therefore, for Congress to discriminate solely on the ground that the institution is unaccredited, and therefore, becomes ineligible to receive Title XIX (Medicaid) funds that are paid only into the general funds of the State of New York . Furthermore, accreditation is decided by the Joint Commission on Accreditation , a private group, in a proceeding in which the Title XVI beneficiary does not participate.

The SSI beneficiary in an unaccredited institution is more likely than the beneficiary in an accredited institution to need to buy a can of food at the commissary to supplement an inadequate diet, to need to buy an item of clothing, etc.

The statutory prohibition of benefits to Koe and his class creates an invidious classification that denies equal protection-due process because the interests served by this classification either may not be constitutionally promoted by the government or are not compelling government interests. Shapiro v. Thompson, 319 U.S. 618, 627 (1968).

De facto, the involuntarily civilly committed state mental hospital inmate has no choice as to which state institution he is committed by the state judge. He cannot choose between an unaccredited state hospital and an accredited state hospital. Neither can he choose an accredited psychiatric facility in a voluntary general hospital.

Accordingly, this SSI exclusion is unconstitutional of its face, or as applied to Koe and his class by the federal defendants.

CONCLUSION

The judgment of the District Court granting the federal defendants' motion to dismiss should be reversed.

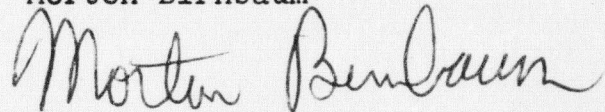
The District Court should be ordered to request that a three-judge District Court be convened to determine the constitutionality of the SSI exclusion of involuntarily civilly committed inmates of state mental hospitals.

Dated: Brooklyn, New York

December 19, 1977

Respectfully submitted,


Morton Birnbaum



STUDIES

- MENTAL HEALTH
- MENTAL RETARDATION

Study #290

October, 1975

J.C.A.H.

ACCREDITATION STATUS
OF STATE
MENTAL DISABILITY
FACILITIES

(As Of July 1, 1975)

Harry C. Schnibbe
Executive Director

Joseph Dias
Staff Assistant

Exhibit "I-1"

&
Robert F. Kreimeyer, Jr.
Research Assistant

1001 Third St., S.W., Washington, D. C. 20024 ☎ Phone 638-2383

NATIONAL
ASSOCIATION

MENTAL
HEALTH
PROGRAM

STATE PSYCHIATRIC FACILITIES
ACCREDITED BY THE J.C.A.H.

State	Number of Facilities	Bed Capacity
Alaska	1	150
Arizona	1	736
Arkansas	2	2,252
California	5	6,843
Colorado	2	1,559
Connecticut	4	4,109
Delaware	1	692
D.C.	1	3,788
Florida	1	1,486
Georgia	3	959
Illinois	11	6,469
Indiana	1	1,135
Iowa	6	1,580
Kansas	2	1,074
Kentucky	4	2,429
Louisiana	2	2,160
Maine	1	1,240
Maryland	5	6,209
Massachusetts	9	5,662
Michigan	8	5,318
Minnesota	7	2,030
Missouri	4	3,286
Nebraska	3	686

Exhibit "I-2"
-OVER-

ACCREDITED PSYCHIATRIC FACILITIES (CONT'D.)

<u>State</u>	<u>Number of Facilities</u>	<u>Bed Capacity</u>
Nevada	1	484
New Jersey	5	7,201
New York	24	39,363
North Carolina	4	6,599
North Dakota	1	900
Ohio	7	2,845
Oregon	2	1,418
Oklahoma	3	3,323
Pennsylvania	14	12,103
Rhode Island	1	1,848
South Carolina	3	4,897
Tennessee	4	3,777
Texas	7	7,117
Utah	1	330
Vermont	1	957
Virginia	4	4,037
Washington	2	1,991
Wisconsin	5	1,710
Wyoming	<u>1</u>	<u>410</u>
TOTALS:	174	163,162

Exhibit I - 3"

STATE PSYCHIATRIC FACILITIES
NOT ACCREDITED BY THE J.C.A.H.

State	Number of Facilities	Bed Capacity
Alabama	2	6,400
California	1	708
Connecticut	3	Not Given
Delaware	1	250
Florida	3	9,245
Georgia	3	9,369
Hawaii	1	224
Idaho	2	681
Illinois	8	6,637
Indiana	5	4,356
Kansas	1	739
Louisiana	1	2,915
Maine	1	889
Massachusetts	6	4,880
Michigan	7	745
Minnesota	1	312
Mississippi	2	3,861
Missouri	4	3,686
Montana	1	1,486
Nevada	1	40
New Hampshire	1	1,250
New Jersey	1	2,209

-OVER-

Exhibit 'I-4'

NON-ACCREDITED PSYCHIATRIC FACILITIES (CONT'D.)

<u>State</u>	<u>Number of Facilities</u>	<u>Bed Capacity</u>
New Mexico	1	700
New York	2	6,840
Ohio	8	6,978
Pennsylvania	6	6,333
Puerto Rico	2	989
South Dakota	1	875
Tennessee	1	2,035
Texas	3	3,266
Virginia	3	2,967
West Virginia	7	3,274
Wisconsin	<u>1</u>	<u>323</u>
TOTALS:	91	95,462

Exhibit 'I-5'

Part I...

TOTAL OF ACCREDITED STATE MENTAL DISABILITY FACILITIES:

Type of Disability Facility	Number Accredited	Number of Beds
• Psychiatric Facilities	114 (2 yr.) 61 (1 yr.)	97,147 66,015
• Alcoholism Facilities	2 (2 yr.) 10 (1 yr.)	42 757
• Facilities for MI Children & Adolescents	10 (2 yr.) 4 (1 yr.)	865
• Long-Term Care MH Facilities	3 (2 yr.) 0 (1 yr.)	2,494
• Facilities for the Mentally Retarded	7 (2 yr.) 2 (1 yr.)	3,570 421

Total Number of Accredited Facilities: 213

Total Bed Capacity of Accredited Facilities: 171,311

Part II...

TOTAL OF NON-ACCREDITED STATE MENTAL DISABILITY FACILITIES:

Type of Disability Facility	Number Non-Accredited	Number of Beds
• Psychiatric Facilities	93	95,462
• Alcoholism Facilities	8	625
• Facilities for MI Children & Adolescents	7	599
• Long-Term Care MH Facilities	6	6,388
• Facilities for the Mentally Retarded	<u>78</u>	<u>59,522</u>
TOTALS	192	162,576

Exhibit I - 64

STATE OF NEW YORK
DEPARTMENT OF MENTAL HYGIENE
ALBANY

LAWRENCE C. KOLB, M.D.
COMMISSIONER

November 26, 1975

Hon. David Mathews
Secretary
Department of Health,
Education and Welfare
Washington, D.C. 20013

Dear Secretary Mathews:

On November 18, 1975 I wrote to you appealing that your office intervene and prevent the cutoff of the \$25.00 per month SSI payments to the penniless patients at Pilgrim Psychiatric Center. As I explained this cutoff would follow the recent non-accreditation of that Center by the Joint Commission on Accreditation of Hospitals which led to your Department informing us of the withdrawal of federal support for this purpose and other purposes in the Center.

My current letter elaborates upon that statement of appeal. As a long-time specialist in the field of psychiatry and as one who has had under treatment many, many individuals over the years and as their current representative in this office, it is my opinion that the withdrawal of this funding for the 1275 Medicaid patients will indeed lead to a serious and, in some instances, irreparable harm to them. My reasons for making this statement are that the withdrawal will be seen as still further betrayal of the society in which they live and will lead to the mounting arousal of the very emotional states and their psychopathology which have required these individuals to seek or be placed for care in a psychiatric facility.

I am certain that in your office your goals are similar to those of us in this Department, and in a society as generous as ours has been and as affluent has it happens to be, it would not be the wish of the Secretary's Office to sustain a decision that would further cause distress and pathology in so many defenseless persons.

Sincerely,

Lawrence C. Kolb, M.D.
Commissioner

LCK:sab
cc: Mr. Schneider ✓
Mr. Posner

Exhibit "II"

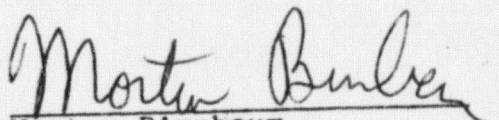
STATE OF NEW YORK
COUNTY OF KINGS

)
) SS.:
)

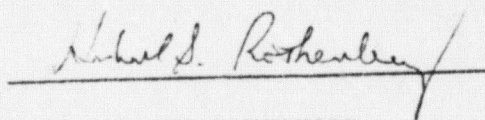
12/19

AFFIDAVIT OF SERVICE

Morton Birnbaum, being duly sworn, deposes and says that he is the attorney for the plaintiffs-appellants; that on the 19th of December, 1977, he served copy of the Brief for Appellants herein together with a copy of the Appendices upon the attorney for the Appellees here, Hon. David G. Trager, at United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201 by first-class mail, post paid.


Morton Birnbaum

Sworn to before me this
19th day of December, 1977



HERBERT S. ROTHENBERG
Notary Public State of New York
No. 24-8677451 Kings County
Comm. Expires March 30, 1978